LIBRARY
SUPREME COURT, U.S.

Office-Supreme Court, U.S.
FILED
SEP 20 1965
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1965

No. 589

SHAPIRO & SON CURTAIN CORP.,

Petitioner,

AGAINST

BASIL GLASS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SECOND CIRCUIT

SHAPIRO & SON CURTAIN CORP.,
Petitioner,
No. 222 Fifth Avenue,
New York, New York.

MAXIMILAN BADER AND
I. WALTON BADER,
Counsel for Petitioners,
No. 170 Broadway,
New York, New York 10038.

LOOMIS APPEAL PRESS, INC., 41 VESEY STREET, NEW YORK, N. Y. WOrth-2-0689

INDEX

PAGE

Jurisdiction 1

Citation of Opinion Below 2

Facts Involved 2

POINT I.—The determination of the Court of Appeals was directly contrary to the determination of the Supreme Court of the United States in *Lamb* v. *Schmitt*, 285 U. S. 222 4

POINT II.—Certiorari should be granted in the instant case because of a conflict between the determination of the Court of Appeals for the Second Circuit and the Court of Appeals for the Tenth Circuit 6

POINT III.—Certiorari should be granted in this cause by reason of the important public interest in the problem set forth herein 8

POINT IV.—Certiorari ought to be granted herein since the determination of the Court of Appeals constitutes a violation of the Fifth Amendment to the Constitution of the United States 9

POINT V.—Certiorari ought also to be granted by reason of the denial of due process to the petitioner in failing to hold a hearing on the question as to whether or not the defendant was engaged in personal business while in New York City and therefore lost his immunity 10

PAGE

POINT VI.—This Court should grant certiorari in the case at bar in order to determine whether or not *Erie* v. *Tompkins* applies to the instant case or whether a Federal Rule should be applied .. 11

CONCLUSION 12

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI:

Complaint 13

Decision of the Court of Appeals for the Second Circuit 18

CASES CITED

Ackerman v. U. S., 179 Fed. (2nd) 236, affirmed 340 U. S. 193 9

Bruning v. U. S., 376 U. S. 358 7

Cafeteria & Restaurant Workers Union, etc. v. McElroy, 367 U. S. 886 5

Calada v. Walker, 10 Cir., 309 Fed. (2nd) 74 ..... 3, 6

DiBella v. U. S., 369 U. S. 121 7

Erie Railroad Company v. Tompkins, 304 U. S. 64.. 11, 12

Ferguson v. Ford Motor Co., 92 Fed. Supp. 868 (DCSDNY) 7

PAGE

Flora v. U. S., 357 U. S. 63 7

Forsyth v. Hammond, 166 U. S. 506 5

Galvan v. Press, 347 U. S. 522 9

Haynes v. U. S., 353 U. S. 81 7

Koral v. Savory Inc., 254 App. Div. 692, 4 N. Y. S. (2) 576 ..... 11, 12

LaBuy v. Howes Leather Co., 352 U. S. 249 8

Lamb v. Schmitt, 285 U. S. 222 ..... 3, 4

McNabb v. U. S., 318 U. S. 332 9

Mitchell v. Budd, 350 U. S. 473 5

Mofett v. Arabian-American Oil Co., 8 FRD 566 ... 7

Monrosa, The v. Carbon Black Export, Inc., 359 U. S. 999 8

NLRB v. Duval Jewelry Co., 357 U. S. 1 7

NLRB v. New Syndicate Co., 365 U. S. 695 7

Pennsylvania Railroad Co. v. O'Rourke, 344 U. S. 334 5

Rainwater v. U. S., 356 U. S. 590 7

Rogers v. Quan, 357 U. S. 193 7

Romero v. International Operating Co., 358 U. S. 354 8

PAGE

United Steel Workers of America v. N. L. R. B., 376 U. S. 492 5

U. S. v. Carlo Bianchi & Co., 373 U. S. 709 7

U. S. v. F. & M. Schaefer Brewing Co., 356 U. S. 227 7

U. S. v. Nugent, 346 U. S. 1 8

U. S v. Zacks, 375 U. S. 59 8

STATUTES CITED

Constitution of the United States, Fifth Amendment 3, 9

28 U. S. C. §1254(1) 1

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. .....

SHAPIRO & SON CURTAIN CORP.,

Petitioner,

AGAINST

BASIL GLASS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioners herein hereby apply to this court for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit in connection with the grant by that court of an order which quashed the service of process upon the respondent herein.

Jurisdiction

This court has jurisdiction granting the relief sought herein pursuant to 28 U. S. C. §1254(1). The decision of the Court of Appeals was made on July 8, 1965. This petition is filed within three (3) months of the determination as required.

Citation of Opinion Below

See Appendix.

Facts Involved

The respondent herein, Basil Glass, is the controlling stockholder and director of a British corporation known as Everwear Candlewick, Limited. This corporation is alleged by the petitioner to be financially irresponsible and has no assets in the United States of America. The Board of Directors of Everwear Candlewick, Limited includes the respondent Glass; another is his brother Julius, and there is a third member not related to either of them. It follows that Julius Glass and Basil Glass control the Board of Directors of Everwear Candlewick, Limited which brought an action in the District Court of the United States for the Southern District of New York against the petitioner in this action.

In the action brought against the petitioner herein by the defendant the claim was made that an agreement with Everwear Candlewick, Limited was breached by the petitioner. The petitioner in its answer in that action denied any breach and further alleged that the agreement was materially altered by the respondent subsequent to its execution. The petitioner also interposed a counterclaim to the effect that said Everwear Candlewick, Limited violated the anti-trust laws of the United States, interfered with the business relationships of the petitioner, brought a malicious and unwarranted suit upon a materially altered document, made wrongful claims which damaged the commercial standing of the petitioner and unlawfully obtained confidential business information, all of which were alleged to be performed at the behest and connivance of the respondent Basil Glass. Basil Glass is a citizen of

Great Britain and is believed to have no assets in the United States.

The respondent Glass was also examined before trial and it was during the course of this examination that he was served with a summons and complaint in an action (now before the court) in which the service of the summons was quashed. The opinion of the District Court as well as the Circuit Court of Appeals for the Second Circuit held that the service of the summons was improper upon the theory that the respondent was entitled to immunity as a witness in the case.

It is the contention of the petitioner that the Court of Appeals for the Second Circuit failed to follow a controlling decision of the United States Supreme Court entitled *Lamb* v. *Schmitt*, 285 U. S. 222, that the Court of Appeals made a determination directly at variance with other determinations within the Second Circuit, and that the Court of Appeals made a determination directly in conflict with the Tenth Circuit case of *Calada* v. *Walker*, 309 Fed. (2nd) 74. It is the petitioner's further contention that the determination of the Second Circuit Court of Appeals deprived the petitioner of his rights without due process of law in violation of the Fifth Amendment to the Constitution of the United States. The constitutional point was also duly raised before the Court of Appeals.

POINT I

The determination of the Court of Appeals was directly contrary to the determination of the Supreme Court of the United States in *Lamb* v. *Schmitt*, 285 U. S. 222.

In the case at bar the respondent Basil Glass, dominating and controlling an alien corporation, brought a suit against the petitioner in the United States District Court for the Southern District of New York. Obviously, by bringing this suit, the corporate plaintiff is subject to jurisdiction under well recognized rules of law which need not be cited here. However, as also appears from the record, the alien corporation is financially irresponsible but the party who brought the action, Glass, is presumably financially responsible and has assets sufficient to meet any personal judgment which may be rendered against him by reason of the counterclaim involved. As held in repeated decisions of the courts the use of a corporate form will not insulate an individual from a tort committed by him as an officer of a corporation.

If Glass were, in fact, a citizen of the United States he would clearly be subject to jurisdiction on the counterclaim involved. If the determination of the Court of Appeals for the Second Circuit were upheld then, in effect, an alien would be given greater rights than a citizen since an alien could organize a financially irresponsible alien corporation, commence a suit in this country in the name of the alien corporation, and be insulated against personal suit in this country for any tort committed by reason of such acts. Thus, if the position of the Court of Appeals was sustained, the immunity would be used to protract the pending litigation and make it more difficult to be carried to a conclusion directly contrary to the position taken by this court in *Lamb* v. *Schmitt, supra.*

This court had a situation, involving considerably weaker facts than that set forth in the case at bar, in the above-cited case. In that case the court held as follows:

> "* * * The question presented here is of a somewhat different character: Whether, despite any effect of the immunity in encouraging voluntary attendance at the trial, it should be withheld for one who, while in attendance, is served with process commanding his continued presence and to facilitate the pending litigation, and to carry it to its final conclusion. * * *
>
> These considerations have in special circumstances led to a denial of the immunity, even though the service was made in a different suit in no sense ancillary to the pending litigation. * * *"

If the determination of the Court of Appeals of the Second Circuit were sustained then a rule of law would be promulgated to the effect that any person coming into a jurisdiction as a witness, whether voluntarily or involuntarily, would be automatically immune from service of process. Such immunity, if applied without restraint, would, in the language of the above-cited decision, "paralyze the arm of the court and defeat the ends of justice in the very cause for the protection of which immunity is invoked".

This court has repeatedly held that where a determination of a lower court conflicts with a prior determination of this court certiorari will be granted. See, for example, *Forsyth* v. *Hammond*, 166 U. S. 506; *Pennsylvania Railroad Co.* v. *O'Rourke*, 344 U. S. 334; *Mitchell* v. *Budd*, 350 U. S. 473; *Cafeteria & Restaurant Workers Union, etc.* v. *McElroy*, 367 U. S. 886; *United Steel Workers of America* v. *N. L. R. B.*, 376 U. S. 492.

POINT II

Certiorari should be granted in the instant case because of a conflict between the determination of the Court of Appeals for the Second Circuit and the Court of Appeals for the Tenth Circuit.

The determination of the Court of Appeals for the Second Circuit, in the case at bar, is directly contrary to the determination of the Tenth Circuit Court of Appeals in *Calada* v. *Walker*, 10 Cir. 309 Fed. (2nd) 74. In that case a corporation plaintiff was seeking to enforce a judgment against one Walker. The Secretary-Treasurer of the plaintiff, one Christensen, was served with process in the case when he was in the district attending as a witness an action seeking to enforce the judgment against Walker. A motion by Christensen to vacate the service of process was denied, the court, on page 76, holding as follows:

> "• • • The two cases are therefore so closely related as to justify the withholding of the claimed immunity. Certainly it cannot be said that this is the case where judicial administration requires that immunity be granted • • • "

The facts in the *Calada* case are actually weaker than the facts in the case at bar. In *Calada* the person served was a citizen of the United States and presumably could be served at any time in the jurisdiction wherein he resided in this country. In the case at bar, however, there is no possibility of getting jurisdiction over Glass, who is concededly an alien and does not reside in this country.

Actually, in addition to failing to following *Calada*, the Court of Appeals also failed to follow other determinations of District Courts in the very jurisdiction wherein

the Court of Appeals sat. The cases involved, however, while cited by petitioner to the Court of Appeals, were not cited by the court in its opinion. Hence it must be assumed that the Court of Appeals did not specifically overrule these determinations. *Ferguson* v. *Ford Motor Co.*, 92 Fed. Supp. 868 (DCSDNY) involved almost the identical situation set forth in the case at bar wherein an attorney appeared in this jurisdiction to take a deposition in a cause pending here and was served with process while so attending. The same rule was enunciated in *Mofett* v. *Arabian-American Oil Co.*, 8 FRD 566, the *Mofett* case specifically holding as follows:

> "• • • The rule does not extend to process which is served in furtherance of the administration of justice in the very cause in connection with which the suitor or witness has come into the jurisdiction • • • "

Where conflict between circuits is involved this court has generally granted certiorari to resolve the conflict. See, for example, *Bruning* v. *U. S.*, 376 U. S. 358; *U. S.* v. *Carlo Bianchi & Co.*, 373 U. S. 709; *DiBella* v. *U. S.*, 369 U. S. 121; *NLRB* v. *New Syndicate Co.*, 365 U. S. 695; *Flora* v. *U. S.*, 357 U. S. 63; *Rogers* v. *Quan*, 357 U. S. 193; *NLRB* v. *Duval Jewelry Co.*, 357 U. S. 1; *Rainwater* v. *U. S.*, 356 U. S. 590; *U. S.* v. *F. & M. Schaefer Brewing Co.*, 356 U. S. 227; and *Haynes* v. *U. S.*, 353 U. S. 81.

It is therefore respectfully submitted that certiorari ought to be granted in this cause on the above grounds.

POINT III

Certiorari should be granted in this cause by reason of the important public interest in the problem set forth herein.

In addition to the grounds urged above, it is respectfully submitted that certiorari ought to be granted in this case by reason of the important public interest of the question presented here. The question involves the possible immunity of an alien from torts committed by the alien by commencing a Suit in the United States in the name of a financially irresponsible corporation. For example assume that an alien individual had committed a tort against a resident. If the alien has a claim against the resident all that the alien need do, if the determination of the Court of Appeals for the Second Circuit is sustained, is to form a financially irresponsible alien corporation, assign his claim to such financially irresponsible corporation, and have the financially irresponsible corporation commence litigation against the United States resident in the name of the corporation. The question presented in this case also involves the nature of the immunity granted to aliens, whether or not aliens are to be given greater rights than United States citizens in actions against U. S. citizens and related matters.

The questions involved, in view of the steadily increasing volume of International dealings, involve questions of great public importance. Under these circumstances this Court ought to grant certiorari under the rationale of *U. S.* v. *Zacks*, 375 U. S. 59; *The Monrosa* v. *Carbon Black Export, Inc.*, 359 U. S. 999; *Romero* v. *International Operating Co.*, 358 U. S. 354; *LaBuy* v. *Howes Leather Co.*, 352 U. S. 249 and *U. S.* v. *Nugent*, 346 U. S. 1.

POINT IV

Certiorari ought to be granted herein since the determination of the Court of Appeals constitutes a violation of the Fifth Amendment to the Constitution of the United States.

In addition to the reasons set forth hereinabove for granting certiorari in this case there also is involved a substantial Constitutional question involving violation of the Fifth Amendment to the Constitution of the United States. This point was raised before the Court of Appeals of the Second Circuit but ignored in the Opinion.

As was held by this court in *Galvan* v. *Press*, 347 U. S. 522, fair play is the essence of "due process". This court also held in *McNabb* v. *U. S.*, 318 U. S. 332; *Ackerman* v. *U. S.*, 179 Fed. (2nd) 236, affirmed 340 U. S. 193, that "due process" requires that a litigant have the right to present his claim including any defenses that he may have. If the determination of the Court of Appeals for the Second Circuit is allowed to stand unreviewed in this case it is respectfully submitted that a direct violation of the Fifth Amendment of the United States has been committed.

The plaintiff in this case is being sued by a financially irresponsible corporation for a substantial sum of money. The plaintiff has, of course, in the pending action, interposed certain defenses. These defenses may or may not be sustained. If the defenses are sustained and the affirmative relief asked for by the plaintiff is granted in the pending action the plaintiff in this action has no redress because the corporate plaintiff in the pending action is financially irresponsible. On the other hand the plaintiff in this action is subject to a Judgment, if its defenses are not sustained in the pending action, for a substantial sum. To

permit an alien to so misuse the processes of our court to obtain such an unjustifiable result would, of course, be a direct denial of "fair play" and thus a violation of "due process".

The grant of immunity from service of process to a purported "witness" coming into a jurisdiction is a court-made rule. Such a court-made rule must fall, of course, if its application results in direct violation of an amendment to the Constitution of the United States.

In view of the direct Constitutional issue involved in this action it is respectfully submitted that certiorari ought to be granted.

POINT V

Certiorari ought also to be granted by reason of the denial of due process to the petitioner in failing to hold a hearing on the question as to whether or not the defendant was engaged in personal business while in New York City and therefore lost his immunity.

In addition to the questions presented above the record before the court indicated a conflict in the affidavits submitted as to whether or not the defendant was engaged in personal business while in New York at the time that his deposition was taken in the pending action. The petitioner requested the District Court to hold a hearing on the question involved wherein testimony might be taken in view of the conflict between the affidavits. The District Court did not hold such hearing. Failure to hold a hearing on a disputed issue of fact is, of course, a violation of due process where the determination of the fact involved has an important bearing upon the determination of the court. It is conceded, of course, that had Glass been involved in per-

sonal business while in New York City at the time that his deposition was taken his immunity from service of process would have been denied under well recognized rules of law. Thus the failure of the courts to hold a hearing on the crucial issue of fact would, even without more, constitute a direct denial of due process of law and would make the determination of the Court of Appeals reversible. In view of the Constitutional issues involved this court should, of course, grant certiorari upon that ground alone.

POINT VI

This Court should grant certiorari in the case at bar in order to determine whether or not *Erie* v. *Tompkins* applies to the instant case or whether a Federal Rule should be applied.

If, in the case at bar, the well known case of *Erie Railroad Company* v. *Tompkins*, 304 U. S. 64, is applicable then the Court of Appeals erred in failing to follow a New York State decision directly contrary to the position taken by the court in this case. The New York case involved is *Koral* v. *Savory Inc.*, 254 App. Div. 692, 4 N. Y. S. (2) 576. In that case service of process was sustained upon a defendant who was an officer of a non-resident corporation defendant who was sued in the plaintiff's State of residence. When the officer appeared for the purpose of giving his deposition the plaintiff served process upon him and such service was sustained. Actually, the situation in the case at bar is stronger than that in *Koral* because, in this case, the corporation involved is a corporate *plaintiff* who has voluntarily brought an action in this jurisdiction rather than a corporate *defendant* who has merely been sued in this jurisdiction. In any

event *Koral* represents the law in the State of New York which is directly contrary to the position taken by the Court of Appeals in the instant case. Hence, if *Erie* v. *Tompkins* is the law then the Court of Appeals determination is clearly erroneous. On the other hand if the Court is permitted to apply Federal law then certiorari should be granted, in any event, to resolve this question.

CONCLUSION

Certiorari in the case at bar should be granted herein, this case reviewed by this Court, and a determination made based upon the record.

Respectfully submitted,

SHAPIRO & SON CURTAIN CORP.,
Petitioner,
No. 222 Fifth Avenue,
New York, New York.

MAXIMILAN BADER AND
I. WALTON BADER,
Counsel for Petitioners,
No. 170 Broadway,
New York, New York 10038.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

Complaint

UNITED STATES DISTRICT COURT

Southern District of New York

Shapiro & Son Curtain Corp.,

Plaintiff,

against

Basil Glass,

Defendant.

Plaintiff, for tis complaint herein, respectfully shows to this Court and alleges:

First: Plaintiff is a corporation duly organized and existing under the laws of the State of New York having its office and place of business at 222 Fifth Avenue, New York, New York.

Second: On information and belief the defendant is a citizen and resident of the United Kingdom having no assistance whatsoever in the United States. Plaintiff is subject to the jurisdiction of this Court by reason of his presence in the United States of America and the service of personal process upon him.

THIRD: Defendant dominates and controls a corporation known as Everwear Candlewick Limited, which corporation is subject to the jurisdiction of this Court since it has commenced an action herein against the defendant which is now pending under 64 Civil 1970. Defendant is further subject to the jurisdiction of this Court since said Everwear Candlewick Limited is merely the "alter ego" of the said Everwear Candlewick Limited.

FOURTH: This Court acquires jurisdiction of this cause of action by virtue of the diversity of citizenship of the parties hereto.

FIFTH: The amount in controversy, exclusive of interest and costs, exceeds the sum of Ten Thousand ($10,000.00) Dollars.

SIXTH: This cause of action sets forth, in part, a claim which may be cognizable only after another claim has been prosecuted to a conclusion. Pursuant to Rule 18(b) of the Federal Rules of Civil Procedure the said claim may be interposed in this action in accordance with the provisions of Rule 18(b).

SEVENTH: On information and belief the said defendant, Basil Glass, conspiring with Everwear Candlewick Limited, Julius Glass, and others not presently known to the plaintiff, embarked upon a combination and conspiracy in an attempt to interfere with the business of the defendant.

EIGHTH: In support of said conspiracy the defendant, and said co-conspirators, on information and belief, performed the following acts:

a) Firms with whom the defendant had no commercial or other relationships, but were customers or suppliers of the plaintiff, were approached by agents of the defend-

ant and were told that the plaintiff corporation engaged in sharp and dishonest business practices, did not live up to their contracts, and was otherwise disreputable and dishonest.

b) Employees of the plaintiff corporation were approached by representatives of the plaintiff, were informed that the plaintiff corporation was disreputable and did not carry out its agreement.

c) Employees of the plaintiff corporation were approached by representatives of the defendant and confidential business information was attempted to be extracted from said employees.

d) Confidential business information was attempted to be extracted from suppliers and other persons with whom the plaintiff had business relations.

e) An Australian corporation, who has had business relationships with a supplier of the plaintiff, was approached by agents of the defendant and was threatened with suit, in an attempt to cause said firm to cancel its agreements with said supplier in the hope that said cancellation would cause annoyance, embarrassment and oppression to the plaintiff.

f) Defendant had its "alter ego" Everwear Candlewick Limited, a corporation having no assets in the United States and being financially irresponsible, commence an action against the plaintiff in this Court, which action is presently undetermined under Civil Action 64 Civil 1970.

g) In the complaint in Civil Action 64 Civil 1790 the defendant inserted false allegations alleging that the matter in controversy herein exceeded the sum of Ten Thousand ($10,000.00) Dollars and that the defendant had breached an agreement with the plaintiff. These allegations were inserted into said complaint under the behest and direc-

tion of said Basil Glass, said Basil Glass well knowing that said allegations were false, untrue, having no probable cause, and without basis in law and fact.

h) In the aforesaid action, 64 Civil 1970, which action was commenced under the direction and the behest of said Basil Glass, an alleged agreement was annexed to said complaint which agreement did not corespond to the agreement executed between the parties. In fact, the aforesaid agreement was materially altered subsequent to its execution by the parties and that fact was well known to the defendant prior to the commencement of 64 Civil 1920.

(i) On information and belief the plaintiff in 64 Civil 1970, Everwear Candlewick Limited is a financially irresponsible company but that the defendant has considerable personal funds. In order to avoid the personal judgment which would be asserted against said defendant after termination of 64 Civil 1970, said defendant deliberately brought said suit in the same name of said irresponsible corporation.

(j) On information and belief the benefits of the aforesaid agreement which were not to be assignable, were deliberately assigned from Everwear Candlewick Limited to Vantona Textile Corporation at the behest and connivance of said defendant so as to attempt to interfere with the business of the plaintiff and destroy the plaintiff's business.

NINTH: As a result of the said unlawful activities on the part of the defendant, as set forth hereinabove, the plaintiff has been severely damaged by reason of, but not limited to, the following:

(a) On information and belief the commencement of the said lawsuit 64 Civil 1970 has been advertised in commer-

cial reports and that, by reason thereof, the commercial standing of the plaintiff has become impaired and its credit position has been weakened.

(b) The interference made by the defendant, with suppliers and employees of the plaintiff has caused dislocation of the plaintiff's business and interference with its relationships with its suppliers.

(c) The commencement of the said action 64 Civil 1970 has caused the plaintiff to expend, and will cause the plaintiff to expend in the future, substantial sums for attorneys' fees required to defend against the instant unlawful action.

TENTH: On information and belief, prior to the commencement of the instant action, the defendant well knew that the agreement sued upon in 64 Civil 1970 was void as violative of the anti-trust laws of the United States and the public policy of the United States of America and the State of New York.

ELEVENTH: In order to avoid the civil and criminal liability which would be imposed against said defendant by reason of his personal participation in the making of an agreement well known by him to be violative of the anti-trust laws of the United States and his deliberate attempt to destroy the business of the plaintiff in violation of the anti-trust laws of the United States, the said defendant deliberately commenced the lawsuit in 64 Civil 1970 in the name of said financially irresponsible corporation, Everwear Candlewick Limited.

TWELFTH: As a result of the unlawful activities of the defendant, as set forth herein, the defendant has been seriously damaged.

THIRTEENTH: Plaintiff demands a trial by jury of all issues involved in this action.

WHEREFORE, plaintiff demands judgment against the defendant in the sum of $100,000.00 trebled to $300,000.00 together with an attorney's fee of $25,000.00 and the cost and disbursements of this action.

Dated: January 23, 1965

BADER AND BADER
Attorneys for Plaintiff
170 Broadway
New York, New York 10038

Decision of the Court of Appeals for the Second Circuit

LEVET, *District Judge*:

The defendant Glass is a director of Everwear Candlewick, Ltd. ("Everwear"), an English corporation, which is the plaintiff in an action in this court against Shapiro & Son Curtain Corp. ("Shapiro"), 64 Civ. 1970. Defendant Glass is a citizen of Britain, residing and domiciled in London, England. He came into this courthouse pursuant to court order for the purpose of being examined before trial in this first action, 64 Civ. 1970. While he was being examined by the attorneys for Shapiro he was served with a summons and complaint in a suit by Shapiro.

In a motion made before Judge Metzner of the Southern District of New York, the defendant Glass moved to vacate the service of the summons and complaint on the ground that he was immune from service of process at

the time he was served. A motion to quash the service was granted and the complaint dismissed.

The complaint in the first action alleges that Everwear and Shapiro entered into a certain written agreement and that Shapiro has breached the agreement in certain respects. Everwear demands that the defendant assign to plaintiff certain patents and that Shapiro account to Everwear for benefits and sums received by it and to pay damages. Shapiro alleged in a counterclaim against Everwear that Everwear was involved in a combination and conspiracy to interfere with its business.

In the present action of Shapiro against Glass, 65 Civ. 202, the complaint asserts that the defendant Glass dominates and controls Everwear. The complaint further alleges that this cause of action is a claim cognizable "only after another claim has been prosecuted to a conclusion," presumably referring to the action by Everwear. The complaint goes on to state that the defendant Glass conspired with Everwear, Julius Glass and others to interfere with the business of the defendant.

Generally, witnesses, parties and attorneys coming from another jurisdiction are exempt from service of civil process during the period required for their attendance in Court. *Stewart* v. *Ramsay*, 242 U. S. 128 (1916); *New England Industries, Inc.* v. *Margiotti*, 270 App. Div. 488 (1st Dept.), aff'd, 296 N. Y. 722 (1946).

In *Lamb* v. *Schmitt*, 285 U. S. 222 (1932), it was pointed out that this rule is founded on the convenience of the court, and "should be extended or withheld only as judicial necessities require." *Id.* at 225. "The test is whether the immunity itself, if allowed, would so obstruct judicial administration in the very cause for the protection of which it is invoked as to justify withholding it. That, as we have

said, depends here upon the nature of the proceeding in which the service is made and its relation to the principal suit, both of which are disclosed by the pleadings." *Id.* at 228.

In *Lamb* v. *Schmitt, supra*, immunity was denied to a non-resident attorney served while acting as a lawyer in a suit to set aside the disposition of property as in fraud of judgment creditors. The service was by a receiver appointed in the main suit and the purpose of the new suit was to recover funds involved in the main suit which had been paid to the attorney ostensibly as fees.

The Supreme Court said: "The deterrent effect, if any, upon attendance at the trial, of the possibility that these procedures may be resorted to, is outweighed by the fact that the immunity, if allowed, might paralyze the arm of the court and defeat the ends of justice in the very cause for the protection of which the immunity is invoked." *Id.* at 226.

Here we have no such case. The counterclaim in the first action may be related to the complaint in the second action, but there is no showing that immunity, if allowed here, would so obstruct judicial administration in the very cause for the protection of which it is invoked as to justify withholding it. Certainly, the mere presence of the relationship is insufficient to dispel the immunity. *Page Co.* v. *MacDonald,* 261 U. S. 446 (1922); *United Nations* v. *Adler,* 90 F. Supp. 440 (S. D. N. Y. 1950).

The fact that Glass's appearance was pursuant to court order does not affect the immunity. *In re Equitable Company,* 277 F. 2d 319 (2nd Cir. 1960). Further, although it is claimed that he dominates and controls Everwear (the plaintiff in the first action), Glass does not lose his immunity on that account. Contrary to appellant's conten-

tion, immunity from service is not denied to plaintiffs. *Page Co.* v. *MacDonald, supra.*

Judge Metzner found that Glass's activities here did not amount to conducting business and hence did not defeat the immunity. The evidence supports his conclusion.

On balance, the inconvenience to Shapiro is far outweighed by the court's interest in securing the participation of non-residents in civil proceedings. *International Plastics Harmonica Corp.* v. *Harmonica Reed Corp.*, 69 F. Supp. 515 (E. D. Pa. 1946).

Affirmed.

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
OCT 16 1965
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1965

No. 589

SHAPIRO & SON CURTAIN CORP.,

Petitioner,

against

BASIL GLASS,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SECOND CIRCUIT

STRASSER, SPIEGELBERG, FRIED & FRANK,
Attorneys for Respondent,
Basil Glass,
120 Broadway,
New York, N. Y.

LEON SILVERMAN,
MILTON R. ACKMAN,
of Counsel.

INDEX

PAGE

Opinions Delivered in Courts Below 1

Question Presented 1

Facts 2

POINT I—(Answering Petitioner's Point I)—The finding that Glass was immune from service of process was mandated by the precedents in this Court, including *Lamb* v. *Schmitt*, 285 U. S. 222 .. 4

POINT II—(Answering Petitioner's Point II)—The facts at bar are distinguishable from those in *Calada* v. *Walker*, 309 F. 2d 74. The decision below does not conflict with any other Circuit Court determination but rather reflects a provident exercise of discretion 7

POINT III—(Answering Petitioner's Point III)—There is no important public question raised by the petition 9

POINT IV—(Answering Petitioner's Point IV)—Shapiro's rights under the Fifth Amendment of the Constitution of the United States have not been violated by the decision below 10

POINT V—(Answering Petitioner's Point V)—Petitioner's attorneys were in fact allowed to cross examine Glass under oath as to his activities in New York when he was served. The uncontroverted facts below did not warrant a hearing since, giving the petitioner the benefit of every inference, the District Court properly found that Glass was not in New York primarily to conduct business .. 11

PAGE

POINT VI—(Answering Petitioner's Point VI)—It is clear that Federal Law governs the grant of immunity from service of process issued by the United States District Court for the Southern District of New York to a person appearing for a deposition in an action pending in that Court. Shapiro did not argue below that New York law applied, and even if New York law were applied Glass would be afforded immunity under the facts at bar 12

CONCLUSION 13

APPENDIX:

Opinion and Order of District Court 14

Affidavit in Support of Motion to Vacate Service of Process 16

Cases Cited

Calada v. Walker, 309 F. 2d 74 (10th Cir. 1962) 8

Dwelle v. Allen, 193 Fed. 546 (S. D. N. Y. 1912) 15

Erie Railroad Co. v. Tomkins, 304 U. S. 64 13

Everwear Candlewick, Ltd. v. Shapiro & Sons Curtain Corp. 2, 9, 16

In Re Equitable Plan Company, 277 F. 2d 319 (2d Cir. 1960) 4, 6, 7, 9, 14

International Plastics Harmonica Corp. v. Harmonic Reed Corp., 69 F. Supp. 515, 516 (E. D. Pa. 1946) 6, 7

Koral v. Savory Inc., 254 App. Div. 692, 4 N. Y. S. 2d 576 (2d Dept. 1938) 13

Lamb v. Schmitt, 285 U. S. 222, 225 (1931) 4, 5, 6, 7, 14

PAGE

Lovejoy v. Foster, 77 F. Supp. 414 (N. D. Tex. 1948) 6

New England Industries v. Margiotti, 270 App. Div. 488, 491 (1st Dept. 1946), affirmed 296 N. Y. 722 (1946) 13

Page Co. v. MacDonald, 261 U. S. 446, 448 (1923) ... 4, 8, 9

Schmitt v. Lamb, 43 F. 2d 770, 771 (N. D. Miss. 1930) 5

Sheeran v. Ravella, 18 F. R. D. 411 (M. D. Pa. 1956) 6

Stewart v. Ramsay, 242 U. S. 128, 129 (1916) 4, 9

Thermoid Co. v. Fabel, 4 N. Y. 2d 494, 499 (1958) .. 13

United Nations v. Adler, 90 F. Supp. 440 (S. D. N. Y. 1950) 6, 14

Other Authority Cited

2 Moore's Federal Practice (2d Ed. 1964) pp. 1093, 1102 .....4, 12, 13

IN THE

Supreme Court of the United States

October Term, 1965

No. 589

SHAPIRO & SON CURTAIN CORP.,

Petitioner,

against

BASIL GLASS,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SECOND CIRCUIT

This brief is submitted by respondent in opposition to petitioner's Petition for a Writ of Certiorari to the Court of Appeals for the Second Circuit.

Opinions Delivered in Courts Below

The opinion of the Court of Appeals for the Second Circuit is reported at 348 F. 2d 460 and is set forth in the Appendix to the Petition. The opinion and order of the District Court is unreported and is set forth in the Appendix (*infra*, pp. 14-15).

Question Presented

Did the courts below abuse their discretion in holding immune from service of process a resident of England who came to New York for the purpose of being examined in an action pending in the United States District Court for the Southern District of New York?

Facts

Respondent, Basil Glass (hereinafter called "Glass"), is a director of Everwear Candlewick, Ltd. (hereinafter called "Everwear"), which corporation is the plaintiff in an action entitled *Everwear Candlewick, Ltd.*, v. *Shapiro & Sons Curtain Corp.*, Civil Action No. 1970/1964, United States District Court for the Southern District of New York (hereinafter called the "prior action"). The defendant in the prior action and petitioner herein, Shapiro & Son Curtain Corp. (hereinafter called "Shapiro"), requested that Everwear be examined by its director, Glass. Glass has been for all of his life a citizen of Britain. He resides and is domiciled in London, England.

Glass came to New York City, New York on Saturday, January 23, 1965 solely for the purpose of being examined before trial upon oral deposition in said action. While he was here for that purpose and while he was being examined by the attorneys for Shapiro in the United States Court House at Foley Square, New York City, New York on Tuesday, January 26, 1965, he was served with the process which is the subject of the instant petition.

The attorneys for Everwear advised the attorneys for Shapiro that Glass would be here solely in connection with his deposition by letter on January 21, 1965.

After Glass was served with process during the course of the deposition, at the request of Shapiro's attorneys and with the concurrence of Everwear's attorney, Shapiro's attorneys were permitted to examine Glass at length and in detail about Glass' purpose in coming to New York and his activities in New York from and after his arrival on Saturday, January 23, 1965. Glass testified that he came to New York City solely for the purpose of being examined by Shapiro's attorneys; on Saturday, January 23, 1965, he remained in his hotel room except for a visit to the New York Boat Show; on Sunday, January 24, 1965, he

stayed at his hotel all day except for dinner, which he had with two old friends; on Monday, January 25, 1965, he was at his attorneys' offices all day discussing the prior action and his prospective deposition; on Monday evening he had dinner with one of his attorneys and the wife of that attorney; and that while he was in New York City he did not transact any business.

The substance of Glass' testimony was set forth in the affidavit submitted in support of the motion to quash (*infra*, pp. 16-18). Those facts were not controverted by Shapiro, but rather Shapiro suggested that during the course of dinner with his friends on Sunday evening, Glass discussed the prior action with his friends and thereby lost his immunity.

The motion came on to be heard in the District Court on Thursday, January 28, 1965. The District Court held that Glass, as a non-resident participating in a judicial proceeding, was immune from service of process. With respect to Shapiro's claim that Glass had lost his immunity, the District Court held:

> "Finally, a claim is made that Glass lost the immunity because he conducted business while he was within this jurisdiction. If the presence in the jurisdiction was primarily for a business purpose other than the litigation at hand, this would be true, but such is not the case here. Glass arrived in this country on Saturday and, aside from going to the boat show that day, he was not otherwise engaged. On Sunday he spent the whole day at his hotel except for having dinner with two people, one of whom plaintiff claims was involved in the first action. The affidavit in opposition to this motion states:
>
> > 'Conversations with the officers of the plaintiff have indicated that the said Basil Glass probably discussed various phases of the instant litigation with the said Samuel Goodman.'
>
> The persons with whom the attorney for the plaintiff discussed the matter and the substance of the conversations are not indicated. Furthermore, the

> conclusion that Glass 'probably discussed' phases of the instant litigation is insufficient. On Monday Glass conferred with his attorneys preparatory to his deposition on Tuesday, at which time he was served with process. Even assuming that Glass did discuss phases of the litigation with Goodman, such meeting was only a fractional part of Glass' stay in this country'' (*infra,* p. 15).

The District Court's order quashing the service of process was unanimously affirmed by the Court of Appeals for the Second Circuit.

POINT I

(Answering Petitioner's Point I.)

The finding that Glass was immune from service of process was mandated by the precedents in this Court, including *Lamb* v. *Schmitt,* 285 U. S. 222.

It has long been well settled that a non-resident who comes into a foreign jurisdiction to participate in a judicial proceeding is immune from service of process while coming, attending the proceedings and leaving that jurisdiction. *Stewart* v. *Ramsay,* 242 U. S. 128, 129 (1916); *Page Co.* v. *MacDonald,* 261 U. S. 446, 448 (1923); *Lamb* v. *Schmitt,* 285 U. S. 222, 225 (1931); *In Re Equitable Plan Company,* 277 F. 2d 319 (2d Cir. 1960); 2 *Moore's Federal Practice* (2d Ed. 1964) pp. 1093-1094.

Here, as in *Stewart* v. *Ramsay, supra,* Everwear would effectively be barred from commencing an action in New York if to do so would subject its officers and directors to the necessity of defending, thousands of miles from their homes, actions for substantial damages.

Shapiro evidently claims that the action instituted against it by Everwear was improperly instituted and the very bringing of the action has caused Shapiro damage. That very claim was asserted in *Page Co.* v. *MacDonald,*

supra, where Page Co. claimed that MacDonald libeled Page Co. in an action instituted by MacDonald. While MacDonald was appearing before a special master in the first action, she was served with a summons and complaint which claimed damages based upon the bringing of the first action. In sustaining the quashing of the service of process, this Court held that even when the wrong complained of by Page Co. was the institution of the first action, MacDonald was immune from service of process while attending a judicial proceeding in the first action.

Shapiro argues that the limited exception to the grant of immunity applied by this Court in *Lamb* v. *Schmitt, supra,* is applicable here. However, the facts at bar do not begin to approach the compelling circumstances present in the *Lamb* case. In *Lamb* the plaintiff was a receiver who brought suit to set aside and impress a trust on certain alleged fraudulent conveyances made by one, Holland, to his wife. Lamb was an out-of-state attorney who came to Mississippi for the purpose of representing Mrs. Holland in an action brought to set aside the conveyances to her. During the course of the action Lamb received $70,000 which he claimed Mrs. Holland paid to him as legal fees, but which the plaintiff claimed actually belonged to the judgment debtor. Lamb was served with process in a second action brought by the receiver to recover the $70,000 paid to him by Mrs. Holland (see *Schmitt* v. *Lamb,* 43 F. 2d 770, 771 (N. D. Miss. 1930)).

Lamb moved to quash the process served upon him and this Court denied his application, holding that the traditional immunity would not be granted where ". . . the immunity, if allowed, might paralyze the arm of the court and defeat the ends of justice in the very cause for the protection of which the immunity is invoked". 285 U. S. at 226. Here no claim can be made that to afford Glass immunity would "paralyze the arm of the court", nor in any way prejudice the conduct of the action between Everwear and Shapiro. In fact, the converse is true. If every

director of Everwear is subject to process merely if he comes to New York to participate in the prior action, then it is obvious that, save in the most exceptional case, it would be better for Everwear to suffer the damages already sustained than have its executives exposed to vexatious and harassing lawsuits.

Moreover in *Lamb* this Court noted (285 U. S. at 227):

> "From the viewpoint of the due administration of justice in the first suit, the second was as much a part of it as if it had been an interlocutory motion to compel the production in court of documents or of property involved in the suit."

Here even Shapiro cannot claim that the action at bar is as much a part of the prior action as an interlocutory motion. In fact, Shapiro expressly alleges that the claim asserted against Glass is a claim cognizable "... only after another claim has been presented to a conclusion" (Complaint, par. Sixth).

The cases that have been decided subsequent to *Lamb* show that the special limitation on the grant of immunity applied in *Lamb* will be most sparingly allowed and only when it is virtually impossible to conduct the prior litigation without the joinder of the non-resident as a party to an action in the same district. See, *e.g.: In Re Equitable Plan Company, supra,* 277 F. 2d at 320; *United Nations* v. *Adler,* 90 F. Supp. 440 (S. D. N. Y. 1950); *Lovejoy* v. *Foster,* 77 F. Supp. 414 (N. D. Tex. 1948); *Sheeran* v. *Ravella,* 18 F. R. D. 411 (M. D. Pa. 1956); and *International Plastics Harmonica Corp.* v. *Harmonic Reed Corp.,* 69 F. Supp. 515, 516 (E. D. Pa. 1946).

Shapiro in effect claims that it may be inconvenienced if, after the trial of the prior action, it obtains a judgment against Everwear which proves to be uncollectable. It may then have to seek recourse against Glass in a second action. Assuming *arguendo* that Shapiro's position is sound in all respects, the inconvenience to Shapiro is irrelevant. As

Judge Kirkpatrick held, the mere fact that immunity "may preclude a shortcut to the final disposition of all the controversies connected with the subject matter at issue is not sufficient". *International Plastics Harmonica Corp.* v. *Harmonic Reed Corp., supra,* 69 F. Supp. at 516.

Glass was advised by counsel that he would be immune from process if he entered this jurisdiction for the purpose of being examined by the plaintiff herein. As Judge Friendly noted in *In Re Equitable Plan Company, supra,* 277 F. 2d at 320, the time-honored immunity for such non-residents must be uniformly applied if non-residents are to be encouraged to participate in judicial proceedings. Otherwise, the purpose of the immunity will be subverted, since no one could advise a client as to his potential status upon entering a foreign jurisdiction.

In short the Courts below properly exercised their discretion in ruling Glass immune from service of process. Their determination was completely consistent with the principles announced in *Lamb* v. *Schmitt, supra* and there is no compelling reason for this Court to review the exercise of discretion below.

POINT II

(Answering Petitioner's Point II.)

The facts at bar are distinguishable from those in *Calada* v. *Walker*, 309 F. 2d 74. The decision below does not conflict with any other Circuit Court determination but rather reflects a provident exercise of discretion.

We have noted that the exercise of discretion by the Courts below was completely consistent with the decisions in this Court. The Court of Appeals held that "[o]n balance, the inconvenience to Shapiro is far out-weighed

by the Court's interest in securing the participation of non-residents in civil proceedings." That determination does not conflict with, and certainly cannot be said to be "directly contrary" to the holding in *Calada* v. *Walker*, 309 F. 2d 74 (10th Cir. 1962). In fact, *Calada* is distinguishable from the case at bar.

In *Calada,* a corporation brought an action in the Colorado State courts on a judgment obtained in California. The defendant served the *corporation* in Colorado by serving a summons and complaint filed in the District Court on the corporation's secretary-treasurer. The defendant claimed that the California judgment was fraudulently obtained. The Tenth Circuit held that the corporation was not immune from service of process. The Court held that since the two actions involved the single judgment the non-resident corporation suing on the judgment should not be immune from suit in Colorado based upon the manner in which the judgment was obtained.

Here, Glass is not a plaintiff. Moreover the claim asserted in the case at bar is that the prior action instituted by Everwear was instituted without probable cause and constitutes an abuse of process. That claim is insufficient to strip a non-resident of his immunity. *Page Co.* v. *MacDonald, supra,* 261 U. S. at 448.

In short, the fact that the courts below exercised their discretion to vacate process while the Tenth Circuit in *Calada,* on a different state of facts, determined that the ends of justice would be served by sustaining the service of process does not present a conflict between the determinations of the Second and Tenth Circuit Courts.

POINT III

(Answering Petitioner's Point III.)

There is no important public question raised by the petition.

The question raised by the petition is one that uniquely concerns Glass, Shapiro and Everwear. This case certainly poses no important issue of law since the determination below involved the application of well settled principles and the provident exercise of discretion. At most it involves a very limited refinement of the grounds upon which discretion in this type of case will be exercised.

The immunity afforded Glass did not turn upon the fact that he was an alien. The same rules apply whether Glass is a resident of Colorado or of Massachusetts (see *Stewart* v. *Ramsey,* and *Page Co.* v. *McDonald, supra*) or of a foreign country (see *In Re Equitable Plan Company, supra*).

Glass is no more immune from suit upon an alleged tort he committed against Shapiro than a resident of Canada or any State would be immune from suit. The only issue raised herein is whether Glass has to defend an action thousands of miles from his home when he is served in New York during the course of a judicial proceeding. Glass, as well as other non-residents, is still subject to service of process for whatever tort he has committed where he lives and works, and jurisdiction over him can be obtained there.

Petitioner's suggestion that Glass formed a financially irresponsible corporation in order to commence the litigation against Shapiro has no basis in fact. *Everwear* and *Shapiro* were the parties to the agreement upon which Everwear's claim against Shapiro is based. Glass, on the other hand, was not a party to that agreement.

Finally, we have noted that the immunity afforded Glass was not based upon the fact that he is an alien but rather turns upon the fact that Glass was a non-resident of New York at the time that he was served in New York. We have already noted that whether he was a resident of a State other than New York, or of a foreign country would not have changed the result. Thus, aliens are not granted greater rights than the citizens of the United States by reason of the determination below. It is at best specious so to argue.

POINT IV

(Answering Petitioner's Point IV.)

Shapiro's rights under the Fifth Amendment of the Constitution of the United States have not been violated by the decision below.

It is difficult to follow the argument set forth at Point IV of petitioner's brief. Shapiro has counterclaimed against Everwear in the prior action. If Shapiro succeeds in its counterclaim it may be awarded judgment. If that judgment cannot be satisfied in the State of New York, Shapiro can seek execution on the judgment where Everwear is domiciled. The fact that Glass is not a party to another action brought by Shapiro does not lessen any rights that Shapiro may have in the action instituted by Everwear.

Whatever rights Shapiro had against Glass it still has. Glass has not brought an action against Shapiro in New York and it is certainly not unfair to grant Glass immunity from process when he comes here in order to participate in a judicial proceeding. Glass remains subject to the jurisdiction of the courts where he lives and works. In short, it is incomprehensible to us how Shapiro's rights under the Fifth Amendment of the Constitution of the United States have been violated by the decision below.

POINT V

(Answering Petitioner's Point V.)

Petitioner's attorneys were in fact allowed to cross examine Glass under oath as to his activities in New York when he was served. The uncontroverted facts below did not warrant a hearing since, giving the petitioner the benefit of every inference, the District Court properly found that Glass was not in New York primarily to conduct business.

Glass was served with process while being deposed in the prior action. Since they were immediately advised that a motion would be made to vacate the service, Shapiro's attorneys requested to examine Glass as to his activities in New York prior to service. They were invited to examine Glass as if they were proceeding to examine him on a hearing held in conjunction with his application to vacate the service.

Shapiro's attorneys did so examine Glass. He testified in substance that he came to New York solely to be examined in the prior action; that after arriving on Saturday, January 23, 1965, he stayed in his hotel room except for a visit to the New York Boat Show; that on Sunday, January 24, 1965, he stayed at his hotel except for dinner with two friends; that on Monday, January 25, 1965, he spent the entire day at the offices of his attorneys, discussing the litigation and his deposition; that on Monday evening he had dinner with one of his attorneys and the wife of that attorney; and that on Tuesday he went to the Federal Court House to be deposed when he was served with process.

The substance of Glass' testimony was set forth in the affidavit submitted in support of the motion to quash. These facts were not controverted by Shapiro, but rather Shapiro suggested that during the course of dinner with

his friends on Sunday evening, Glass discussed the prior action and thereby lost his immunity.

We submit that the District Court's ruling on Shapiro's claim was entirely sound. Even assuming Glass discussed the prior action with friends during the course of dinner, that discussion was a fractional part of his stay in New York. Shapiro did not controvert the fact that Glass had come to New York to be examined.

In short, on the basis of the uncontroverted facts it was clear that Glass' overriding purpose in coming to New York was to be deposed by Shapiro's attorneys, and therefore he was immune from service of process when he was served. See 2 *Moore's Federal Practice* (2d Ed. 1964), p. 1102.

Furthermore, no hearing was necessary since Shapiro's attorneys in fact examined Glass, and they were not prevented from adducing whatever evidence they had on the motion. There was no reason for the Court to delay Glass' return to his home and no error was committed below.

POINT VI

(Answering Petitioner's Point VI.)

It is clear that Federal Law governs the grant of immunity from service of process issued by the United States District Court for the Southern District of New York to a person appearing for a deposition in an action pending in that Court. Shapiro did not argue below that New York law applied, and even if New York law were applied Glass would be afforded immunity under the facts at bar.

Below Shapiro did not urge that the law of New York applied. In any event, it is clear that the federal courts apply federally created principles in determining whether

a person attending on a judicial proceeding pending in the District Court is immune from service of process issued by the District Courts. 2 *Moore's Federal Practice* (2 Ed. 1964), pages 1092-1093.

Moreover, as the Court of Appeals noted, New York law affords immunity to non-resident parties who come to New York to testify in examination before trial pursuant to an order for their examination. *New England Industries* v. *Margiotti,* 270 App. Div. 488, 491 (1st Dept. 1946), affirmed 296 N. Y. 722 (1946). And see *Thermoid Co.* v. *Fabel,* 4 N. Y. 2d 494, 499 (1958). *Koral* v. *Savory Inc.,* 254 App. Div. 692, 4 N. Y. S. 2d 576 (2d Dept. 1938) cited by petitioner, is a memorandum affirmance by the Appellate Division for the Second Department of an unreported decision. Whatever may have been decided by that case, the subsequent decisions by New York's highest court cited above are controlling and they would afford Glass immunity.

In short, this case presents no problem under *Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64. Federal principles clearly control and even if New York law were to be applied, Glass would still be immune from service of process.

CONCLUSION

For all of the foregoing reasons Petitioner's application should be denied.

Dated: October 15, 1965.

Respectfully submitted,

STRASSER, SPIEGELBERG, FRIED & FRANK,
Attorneys for Respondent,
Basil Glass.

LEON SILVERMAN,
MILTON A. ACKMAN,
of Counsel.

APPENDIX

Opinion and Order of District Court

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

65 Civ. 212

SHAPIRO & SON CURTAIN CORP.,

Plaintiff,

against

BASIL GLASS,

Defendant.

METZNER, D. J.:

Defendant Glass moves to vacate service of the summons and complaint on the ground that the defendant was immune from service of process at the time he was served.

Defendant is a director of Everwear Candlewick, Ltd., which corporation is the plaintiff in an action against Shapiro & Sons Curtain Corp. The latter corporation instituted suit against Glass by the service of a summons and complaint upon him in this courthouse, where he was testifying in deposition proceedings pursuant to an order in the first action.

While there is a relationship between the two actions, I find that this relationship does not come within the situation covered in *Lamb* v. *Schmitt,* 285 U. S. 222 (1932); *In re Equitable Plan Co.,* 277 F. 2d 319 (2d Cir. 1960); *United Nations* v. *Adler,* 90 F. Supp. 440 (S. D. N. Y. 1950).

Plaintiff claims that Glass's presence in this jurisdiction was not a voluntary act upon his part. The fact that Glass was present in the jurisdiction pursuant to an order of this court does not change the result. *In re Equitable*

Plan Co., supra; Dwelle v. *Allen*, 193 Fed. 546 (S. D. N. Y. 1912).

Finally, a claim is made that Glass lost the immunity because he conducted business while he was within this jurisdiction. If the presence in the jurisdiction was primarily for a business purpose other than the litigation at hand, this would be true, but such is not the case here. Glass arrived in this country on Saturday and, aside from going to the boat show that day, he was not otherwise engaged. On Sunday he spent the whole day at his hotel except for having dinner with two people, one of whom plaintiff claims was involved in the first action. The affidavit in opposition to this motion states:

> "Conversations with the officers of the plaintiff have indicated that the said Basil Glass probably discussed various phases of the instant litigation with the said Samuel Goodman."

The persons with whom the attorney for the plaintiff discussed the matter and the substance of the conversations are not indicated. Furthermore, the conclusion that Glass "probably discussed" phases of the instant litigation is insufficient. On Monday Glass conferred with his attorneys preparatory to his deposition on Tuesday, at which time he was served with process. Even assuming that Glass did discuss phases of the litigation with Goodman, such meeting was only a fractional part of Glass's stay in this country.

Motion to quash is granted, and the complaint dismissed. So ordered.

Dated: New York, N. Y.
February 17, 1965

CHARLES M. METZNER,
U. S. D. J.

Affidavit in Support of Motion to Vacate Service of Process

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

65 Civil 212

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

MILTON R. ACKMAN, being duly sworn, deposes and says:

1. I am an attorney associated with the firm of Strasser, Spiegelberg, Fried & Frank, attorneys for defendant, and I make this affidavit in support of defendant's application to quash the summons and complaint served on defendant on January 26, 1965. (A copy of said summons and complaint will be handed up to the Court on the return day of this motion.)

2. Defendant is a Director of Everwear Candlewick, Ltd. which company is the plaintiff in an action entitled *Everwear Candlewick, Ltd.* v. *Shapiro & Sons Curtain Corp.*, Civil Action No. 1970/1964, United States District Court for the Southern District of New York. The defendant in that action requested that plaintiff in that action be examined by its Director, Basil Glass. Basil Glass came to this jurisdiction on January 23, 1965 solely for the purpose of being examined before trial in said action. While he was here for that purpose and while he was being examined by the attorneys for Shapiro & Son Curtain

Corp. in room 615A of the Courthouse of this Court on January 26, 1965, he was served with the process which is the subject of the instant application.

3. I advised the attorney for the plaintiff herein that Basil Glass would be here solely in connection with his deposition by letter on January 21, 1965. Prior to the service of the process herein I have had conversations with I. Walton Bader, Esq., one of the attorneys for the plaintiff in this action. During the course of these conversations, Mr. Bader (who is the attorney for the defendant in Civil Action 1970/1964) "threatened" that if Basil Glass came to New York he would serve him with process. I told Mr. Bader that Mr. Glass would be immune from process if he came here solely to be examined before trial, and Mr. Bader conceded as much. It is obvious that the service of process at bar was merely a naked and outrageous attempt to cause Mr. Glass further inconvenience and expense.

4. During the course of the deposition of Basil Glass this day I permitted Mr. Bader to examine Mr. Glass at length and in detail about Glass' purpose in coming to New York and his activities here since he arrived on Saturday, January 23, 1965. Mr. Glass testified:

(a) He came to New York solely for the purpose of being examined by Mr. Bader.

(b) On Saturday, January 23, 1965, he remained in his hotel room except for a visit to the Boat Show.

(c) On Sunday, January 24, 1965, he stayed at his hotel all day except for dinner, which he had with two old friends.

(d) On Monday, January 25, 1965, he was at our offices all day discussing Civil Action 1970/1964 and his coming deposition.

(e) On Monday evening he had dinner with John F. Finn, Jr., a member of the firm of Strasser, Spiegelberg, Fried & Frank, attorneys for plaintiff, and his wife.

(f) While he has been here he has not transacted any business.

5. During the course of the deposition Mr. Bader stated that it was agreeable to him that this order to show cause be set down for hearing on Thursday, January 28, 1965. Mr. Glass will be in Court on that day (if this application be made returnable on that date) should the need to examine him further arise. Since Mr. Glass has come here at great cost and inconvenience and he would like to return to his business and home in London, England, it is respectfully requested that this application be set down for hearing on Thursday, January 28, 1965. Once any hearing on this application is held and concluded, Mr. Glass will then be able to return home. He now has confirmed reservations to leave New York for London on Friday morning, January 29, 1965.

6. No previous application has been made for the relief sought herein.

WHEREFORE, I respectfully pray that this Court (a) sign the order to show cause and make this application returnable on Thursday, January 28, 1965; and (b) on the hearing of this application, vacate and set aside the process served upon defendant and dismiss the action with costs and disbursements.

MILTON R. ACKMAN.

(Sworn to January 26, 1965.)

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
OCT 2 8 1965
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1965

No. 589

SHAPIRO & SON CURTAIN CORP.,
Petitioner,

AGAINST

BASIL GLASS,
Respondent.

PETITIONER'S REPLY

SHAPIRO & SON CURTAIN CORP.,
Petitioner,
No. 222 Fifth Avenue,
New York, New York.

MAXIMILIAN BADER AND
I. WALTON BADER,
Counsel for Petitioners,
No. 170 Broadway,
New York, New York 10038.

LODER APPEAL PRESS, INC., 41 VESEY STREET, NEW YORK, N. Y. WOrth-2-0639

INDEX

PAGE

POINT I.—*Calada* v. *Walker* is not distinguishable 1

POINT II.—Application of the law of the State of New York, in the case at bar, would have resulted in a finding denying Glass immunity ... 3

POINT III.—There is substantial constitutional violation if the determination of the Second Circuit Court of Appeals goes unreviewed 4

CONCLUSION 5

CASES CITED

Calada v. Walker, 309 Fed. (2d) 74 ..... 1, 2, 3

Erie Railroad Company v. Tompkins, 304 U. S. 64 3

Koral v. Savory, 254 App. Div. 692 (also cited 84 A. L. R. 2d 444) 3

New England Industries v. Margiotti, 270 App. Div. 488 3

Thermoid Co. v. Fabel, 4 N. Y. (2d) 494 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 589

SHAPIRO & SON CURTAIN CORP.,

Petitioner,

AGAINST

BASIL GLASS,

Respondent.

PETITIONER'S REPLY

The respondent's brief in opposition to the petition for a writ of certiorari clearly indicates the reason why the petition should be granted. There are however, certain inaccuracies in the respondent's brief which petitioner would like to call to the court's attention.

POINT I

Calada v. *Walker* is not distinguishable.

The respondent claims that the Tenth Circuit determination in *Calada* v. *Walker*, 309 Fed. (2d) 74 is distinguishable from the case at bar because the *specific facts* are slightly different from the *specific facts* in the case at bar.

Calada, on the other hand, did not turn on these specific facts but set forth the general proposition that where the later action, in which the immunity from service is claimed, arises out of or involves the same subject matter as the one in which the non-resident has voluntarily attended, the immunity is not present. This was specifically set forth in the *Calada* decision as follows:

> "* * * The immunity should not be enlarged or extended beyond the reason upon which it is founded. Lamb v. Schmitt, supra. Accordingly, certain well-recognized exceptions to the general rule have been established. One of these generally recognized exceptions denying or withholding immunity is where the later action, in which the immunity from service is claimed, arises out of or involves the same subject matter as the one in which the nonresident has voluntarily attended. Lamb v. Schmitt, supra; Kirtley v. Chamberlin, 250 Iowa 136, 93 N. W. 2d 80; Miller v. Miller, 153 Neb. 890, 46 N. W. 2d 618; Velkov v. Superior Court, 40 Cal. 2d 289, 253 P. 2d 25, 35 A. L. R. 2d 1348; Livengood v. Ball, 63 Okl. 93, 162 P. 768, L. R. A. 1917C, 905. * * *"

In the case at bar the action in which Glass claimed immunity relates to the precise subject matter as the one in which Glass voluntarily attended. It is charged that Glass maliciously interfered with the business of the plaintiff in various respects including inducing a financially irresponsible corporation to commence an unwarranted action in the United States District Court. Hence, if the rule of *Calada* is followed the Court of Appeals erred in granting Glass immunity from suit thereby clearly indicating a conflict between determinations of courts of different circuits and warranting grant of the instant petition.

POINT II

Application of the law of the State of New York, in the case at bar, would have resulted in a finding denying Glass immunity

The respondent claims that the doctrine of *Erie* v. *Tompkins* is not applicable to the case at bar because the law of the State of New York and the federal law is the same. The law of the State of New York is set forth in *Koral* v. *Savory*, 254 App. Div. 692 (cited also in 84 A. L. R. 2d 444). As was held in that case a nonresident who had been named a party to an action was not immune from service of summons in such action while attending an examination as an officer of a corporation party to a suit. This case was *not overruled* in *New England Industries* v. *Margiotti*, 270 App. Div. 488. The subsequent case cited by the respondent, *Thermoid Co.* v. *Fabel*, 4 N. Y. (2d) 494 *does not overrule Koral.* In the *Thermoid* case the non-resident was *indicted* in New York and voluntarily attended in connection with the indictment. This is certainly a far different situation than where a nonresident officer of a corporation plaintiff enters the jurisdiction for the purpose of prosecuting litigation against the plaintiff who seeks relief in another action involving the precise subject matter. The law of New York still holds that a corporation officer who enters the jurisdiction to testify in connection with an action in which the corporation is a party is not immune from service of process in connection with any related action. Actually, of course, the case at bar involves stronger facts than *Koral*. In the case at bar the corporation is a *plaintiff* and has appeared in our courts in an attempt to enforce an alleged claim against the petitioner. In *Koral* the corporation

was a *defendant*. Obviously a party who seeks to utilize the processes of our courts cannot claim immunity from service of process in a related action.

POINT III

There is substantial constitutional violation if the determination of the Second Circuit Court of Appeals goes unreviewed.

In the response to the petition the respondent claims that no constitutional violation has occurred because "• • • Glass remains subject to the jurisdiction of the courts where he lives and works. • • •" But this is precisely wherein the constitutional violation occurs and involves the point of distinction between a situation involving an *alien officer of an alien corporation* and a situation involving an officer of a foreign corporation. As correctly stated by the respondent the courts have not seen fit to make this distinction and this is one of the reasons for urging review here. If a foreign corporation commences a suit in this jurisdiction and immunity is granted to the officer from suit in this jurisdiction there involves no substantial denial of due process. If the defendant in the action here has a claim against the officer of the foreign corporation he may prosecute this claim in the courts of the jurisdiction of the other state where the officer would be subject to personal suit. Since the principles of the United States Constitution would apply to the courts of the other state or to the other federal court the only prejudice suffered by the grant of immunity is one of inconvenience. However, where an *alien officer of an alien corporation* is involved the requirement that the alien officer must be sued in the *country of his resi-*

dence constitutes a denial of due process. The substance of law of the foreign country where suit would have to be brought could be so alien to the provisions of our constitution as to make such a suit meaningless. Furthermore the requirement that a suit be brought in the alien jurisdiction would mean that the United States citizen would have to subject himself to the jurisdiction of the alien court with all of the infirmities that this might involve. Hence, to permit an alien to organize a financially irresponsible alien corporation and utilize the alien corporation to sue in our courts and then grant the alien immunity from personal suit if he appears in this jurisdiction in order to aid in prosecuting the prior claim would, it is submitted, be a direct violation of the Fifth Amendment to the Constitution of the United States.

CONCLUSION

The petition should be granted.

Respectfully submitted,

SHAPIRO & SON CURTAIN CORP.,
Petitioner,
No. 222 Fifth Avenue,
New York, New York.

MAXIMILIAN BADER AND
I. WALTON BADER,
Counsel for Petitioners,
No. 170 Broadway,
New York, New York 10038.